Registry's translation, the French text alone being authoritative.

FIFTY-EIGHTH ORDINARY SESSION

In re FRANCESE and GUASTAVI

Judgment No. 742

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the International Centre for Advanced Technical and Vocational Training (International Labour Organisation) by Mrs. Maria Concetta Tita Francese and Mrs. Adelina Guastavi on 23 January 1985 and corrected on 21 February, the Centre's replies of 3 April, the complainants' rejoinders of 9 September and the Centre's surrejoinders of 31 October 1985;

Considering Article II, paragraph 1, of the Statute of the Tribunal, Articles 1, 2 and 7 of the Headquarters Agreement concluded on 29 July 1980 between the ILO and the Government of Italy concerning social security provision for Centre staff, Article 17 of the Staff Regulations of the Centre in force up to March 1970, Article 9.2 of the Regulations adopted in March 1970 Article 12.2 of the present Regulations and Article 23(a) of the Regulations and Rules of the United Nations Joint Staff Pension Fund;

Having examined the written evidence and disallowed the complainants' applications for oral proceedings;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainants are both Italian citizens and employed on the staff of the Centre. When the Centre started work in 1965 Italian staff were required to join the Italian national pension scheme (Istituto Nazionale della Previdenza Sociale, or INPS), one reason being that the Centre had an uncertain future and could not guarantee a long career. But the other staff were affiliated, for want of any other solution, to the United Nations Joint Staff Pension Fund (described below as "the Fund"). Article 17 of the Centre Staff Regulations in force at the time precluded Fund membership for Italian staff. By 1970 the Centre's future looked more stable, and new Staff Regulations were approved in March of that year, Article 9.2(a) of these prescribed Fund membership for everyone unless the contract of appointment precluded it. Mrs. Francese was engaged in July 1970 on a one-year appointment, and her contract said she would be with the INPS and could not join the Fund. Mrs. Guastavi was appointed in September 1975 on a one-year contract with a similar clause, and she was also with the INPS. At the date of filing Mrs. Francese held a two-year appointment and Mrs. Guastavi a one-year one.

At the outset benefits under the two schemes were much the same. But the INPS pensions lost ground steadily, largely because from 1968 upper limits were set on pensions, however high the contributions might be, and though the limits were raised from time to time the fall in the purchasing power of the lira was not wholly offset. Up to 1980 the limits were very low: since 1981 they have partly caught up. As early as 1972 staff with the INPS were troubled to find that, though contributing as much as members of the Fund, they were to get lower pensions; part of their contributions, they felt, were "sunk capital".

Article 23(a) of the Fund Regulations and Rules states that a member may apply for validation of prior contributory service within one year of admission and on four conditions. Condition (iii) requires that "participation had not, during such service, been expressly excluded by the terms of his appointment". For that purpose the Centre asked the INPS on 24 February 1978 to refund the staff's contributions.

In May 1978, however, a new obstacle became apparent. On 2 May the Secretary of the ILO Staff Pension Committee wrote to the Director to point out condition (iii) in Article 23(a) of the Fund rules. In a letter of 25 May to the Director the Secretary of the Fund said that validation was indeed impossible where participation in the Fund had been precluded by the contract; the only expedient would be for the Board of the Fund to authorise redemption of prior service and have each staff member pay the actuarial cost of membership for periods prior to his affiliation.

But redemption cost much more than validation, and not every staff member could afford it. Repayment by the INPS was essential, and for that purpose, among others, the Italian Government and the ILO signed an Agreement

on 29 July 1980 on social security for the Centre staff ("the Agreement"). Article 2 read: "(i) The staff members of the Centre are insured against the risks of invalidity, old age and death by the United Nations Joint Staff Pension Fund," and any contributions to the INPS which had not yet conferred entitlement to benefit were to be refunded according to arrangements to be made by the Director and the INPS. But under Article 2(3) and (4) present staff might, if they preferred, continue to be members of the INPS and new Italian staff might also opt for the INPS.

The Italian Parliament ratified the Agreement on 4 February 1982 and the Director started negotiating with the INPS over the refund arrangements and with the Fund over redemption, On 7 April he wrote to each of the Italian staff to say that, if already with the Fund, they might redeem at actuarial cost and, if with the INPS, they might shift to the Fund and also redeem. In July 1983 the ILO concluded arrangements with the Fund for redemption by 35 Italian staff members of three years' service at the actuarial cost as at 1 July 1982.

In accordance with arrangements prescribed in Article 7 the Agreement came into force on 1 March 1984. A circular of 26 March, No. 84/9, gave information intended to help the INPS members to decide whether to transfer to the Fund and redeem three years' service. It also gave information to those who were already with the Fund. One important point was that the INPS would repay the contributions only at nominal value and without interest. Fifteen of the 35 staff members decided not to redeem because the cost was too high, and they included Mrs. Francese and Mrs. Guastavi.

On 21 August 1984 the two complainants and others submitted a "complaint" to the Director under Article 12.2 of the Staff Regulations. They expressed dissatisfaction with the decision to refund the INPS contributions only at nominal value and without interest, the sums being far too small to pay for redemption. They argued that the purpose of the Agreement was to remedy the Centre's error in affiliating them to the INPS and not to the Fund. They asked the Centre to pay the full actuarial cost of their retroactive affiliation to the Fund as from the date of appointment, less the amounts refunded by the INPS, and to review the arrangements for redemption in keeping with their reading of the Agreement. By letters of 24 October 1984 the Director rejected the "complaints" and those are the decisions the complainants are impugning.

Proposals were made in December 1984 for the redemption of a further period of three years' service. But the United States dollar, the currency in which payment had to be made to the Fund, had by then risen by 40 per cent from its figure for 1982 in terms of the lira, and the cost was so high that very few redeemed the further period.

B. The complainants put forward three main pleas.

(1) The Centre was in breach of the terms of their appointment because it violated the Agreement which was introduced into those terms, as evidenced by circular 84/9 and other texts, and had the effect of altering their contractual relationship with the Centre. As they see it, Article 2 of the Agreement declares that all Centre staff may be members of the Fund, and there is no restriction of that provision in time: it applies to the full period of the staff member's employment at the Centre. That is supported by the reference in Article 2(2) to the refund of the INPS contributions, which can only refer to contributions made throughout the period of employment, again without restriction in time. There would indeed be no point in refunding INPS contributions if the staff were not to be covered instead by the Fund for the periods for which they had paid them. Although the Agreement is res inter alios acta the complainants may still rely on rights they found on the terms of the Agreement and on an interpretation of those terms on which, as its case law bears out, the Tribunal is fully competent to rule.

(2) The complainants plead breach of the principle of equal treatment. It is mistaken to argue that the Italian staff were not in the same position as the others and might therefore be treated differently. The Centre's shaky prospects in the early years were the same threat to everyone on the staff. The Centre may have meant well in affiliating Italian staff to the INPS so as to protect their interests -- a solution not available for other staff. But had they been affiliated instead to the Fund, and even if the Centre had collapsed and the Italian staff had lost their jobs within five years, they could still have got their contributions back from the Fund and invested them with the INPS anyway. Moreover, in several respects the Fund offered better terms than the INPS. Actually the Italian staff were not given equal treatment even between themselves: from 1969 some were admitted to the Fund on appointment, others to the INPS, and others again, already with the INPS, were refused transfer to the Fund.

(3) The complainants allege breach of good faith, By a minute of 19 October 1977 from the Director to fifteen staff members who at the time applied for validation; by a paper submitted to the Board of the Centre in November 1980; and by a statement made by the Chairman of the Board at a Board meeting on 20 May 1983 they were given

assurances that everything would turn out well. Those assurances have not been respected.

The complainants invite the Tribunal to quash the impugned decision and order the Centre to pay them, or their successors as defined in the Fund Regulations, additional benefits -- in regular payments or in a lump sum, or in both forms -- such that the aggregate of payments from the Fund and the Centre shall equal the full amount of the sums that the Fund would have paid had they been members from the date of their taking up duty at the Centre, provided that they agree to pay the difference, plus compound interest at 3.25 per cent a year, between the amount of the contributions paid to the INPS and the amount of those that would have been due to the Fund for the period of their service at the Centre during which they were barred from Fund membership; or else, with the same proviso, the actuarial cost, reckoned at the day of publication of the judgment and comprising the complainants' and the Centre's shares, of redeeming the same part of the period of their service, or any other sum the Tribunal may deem fit, payment to be made within 60 days or, thereafter, to be accompanied by compound interest from the date of the judgment at 14 per cent a year, the rate the Centre applied for the purposes of the redemption agreement.

Mrs. Francese seeks 12,500 French francs and Mrs. Guastavi 7,500 francs in costs.

C. In its detailed replies to the two complaints the Centre gives a full version of the facts. Its submissions may be summed up as follows.

(1) The Centre committed no breach of any provision of the successive sets of applicable Staff Regulations, and the Director correctly exercised his authority thereunder. Besides, had the complainants felt that it would be to their advantage to join the Fund and leave the INPS, they were free, when their contracts were renewed each year or every other year, to make a formal claim to the Director for amendment of the clause on pension rights. They did not do so, Once they had changed to the Fund, it was too late for them to allege a breach of the Staff Regulations. Such a view is in line with the Tribunal's Judgment 358.

(2) The Headquarters Agreement has effect only as between the parties. The construction the complainants put on it is untenable. It did not require of the Director that he take any particular decision with regard to the complainants; it mere y enabled him to offer them a choice he had been unable to o fer before. It does not form part of the Staff Regulations which only the Board of the Centre may amend, nor can it, by more implication, be given the retroactive effect the complainants claim. For one thing, since it does not alter the rights of the staff, its interpretation is exclusively a matter for the parties, Italy and the ILO. For another, its retroactive application was impossible because several Italian staff members had already retired and were receiving INPS pensions; the Agreement could not apply retroactively to some and not to others.

(3) The plea of breach of the principle of equality is unsound. The Staff Regulations of 1966 and 1970 required that the complainants join the INPS. Even if that had been a breach of equality it would not have been unlawful since it was expressly provided for by the Regulations, and there is no higher principle that condemns the affiliation of Italian staff to the national pension scheme of their own country. Moreover, because the Centre's finances were precarious in the early days the Italian and the non-Italian staff were not in the same factual position, and there was no discrimination against the former. The difference in fact was that, had the Centre collapsed, the non-Italian staff would have had to go back to their own countries, whereas the Italians would presumably have stayed in their own and could, on finding new jobs there, have continued to contribute to the INPS. The Centre explains that as between themselves the Italian staff, including the complainants, received equal treatment, such minor variations as there may have been being due to slight differences of fact. In any event the plea of breach of equality is time-barred since the Italian staff have been members of the Fund for years now,

(4) Lastly, the charges of breach of good faith are also unsubstantiated. In particular, the statement by the Chairman of the Board has been misunderstood. The whole history of the dispute shows that the Centre has from the outset done its utmost to get the best possible terms for the redemption in complex negotiation with the Italian Government, the Fund and the complainants themselves.

The Centre accordingly invites the Tribunal to dismiss the complaints as devoid of merit.

D. In their rejoinders the complainants point to what they regard as mistakes or misrepresentations of fact in the Centre's replies. They seek to refute the Centre's arguments and enlarge on their own principal pleas, namely that the Agreement should be construed as conferring entitlements on them and that its effects are not limited to the period following the date on which it came into force; that there was breach of the principle of equality, since no

agreement concluded between the Centre and the host State has ever established a distinction between Italian and other staff in the matter of social security; and that there was breach of good faith, even though the reason may have been that bureaucracy got the better of the Centre's resolve to settle the case satisfactorily.

E. The Centre devotes its surrejoinder to further discussion of the facts insofar as they are in dispute and to elaboration and, insofar as it feels they have been distorted or misunderstood, clarification of the arguments in its replies. It again invites the Tribunal to dismiss the complaints as devoid of merit.

CONSIDERATIONS:

1. The Tribunal joins the complaints lodged by Mrs. Francese and Mrs. Guastavi, which raise the same issues.

2. Mrs. Francese and Mrs. Guastavi are Italian citizens. Mrs Francese joined the International Centre for Advanced Technical and Vocational Training on 30 July 1970, Mrs. Guastavi on 16 September 1975. At those dates there were Staff Regulations which said that Centre staff were affiliated to the United Nations Joint Staff Pension Fund ("the Fund"), provided that such affiliation was not excluded by the terms of their appointment. If on appointment a staff member was already affiliated to a national pension scheme or some other scheme the Director of the Centre might decide that he should continue to be so, his affiliation to the Fund being thereby excluded.

These are the rules that were applied to the complainants. The one-year appointments which they and the Director signed expressly referred to their affiliation to the Italian State pension scheme known as the INPS (Istituto Nazionale della Previdenza Sociale), and reaffirmed their exclusion from the Fund. Mrs. Guastavi's one-year appointments were renewed without break. Mrs. Francese later obtained renewable two-year appointments.

3. For reasons there is no need to go into, the benefits payable by the INPS soon began to look much less attractive to the Italian staff than those they would have got had they been with the Fund, like non-Italian staff.

The Centre was not indifferent and it considered several expedients, In the end the only one that proved possible was to negotiate the matter with the Italian Government and at last, on 29 July 1980, the two sides concluded what was known as a "Headquarters Agreement between the International Labour Organisation and the Government of Italy concerning social security provision". (It covered matters besides pensions.) Cited below as "the Agreement", it came into force on 1 March 1984 after ratification by the Italian Parliament. There is no reference to approval by the General Conference of the ILO, to which the Centre is affiliated, or even by the Board of the Centre.

Talks were going on at the same time with the Fund. The Fund having accepted the new position brought about by the Agreement, Article 9.2 of the Staff Regulations was amended in November 1981 to provide for the affiliation of Centre staff to the Fund.

Whereas relations between the Centre and the Fund are not at issue in this case, difficulties soon arose between the Centre and some members of its staff, including the two complainants, over the application of the Agreement.

4. Only Articles 1 and 2 are material. Article 1 lays down the general rule that staff "are subject to their own social security scheme, in accordance with the Centre's Staff Regulations, and are therefore not subject to Italian social security legislation". Article 2 provides that staff shall be insured against disability, old age and death under the Fund but, to protect acquired rights, any staff member who so wishes may stay with the INPS. Italian staff appointed after the Agreement comes into force may also opt for the INPS.

The important provision for the purposes of this case is Article 2(2): "Contributions which have been paid in respect of Italian insurance against disability, old age and death and which have not yet conferred entitlement to benefit shall be refunded by the INPS. De INPS shall refund the sums to the Centre on behalf of the staff members concerned in accordance with arrangements made directly between the INPS and the Director of the Centre".[(1)]

The ILO accordingly approached the Fund and on 14 July 1983 they concluded an agreement on recognition of past service by means of redemption. It set at 1 July 1982 the date of reckoning the actuarial cost.

Meanwhile the Italian Government and the Centre were discussing the arrangements for the repayment of the INPS contributions. On this cardinal question the Government finally decided that the INPS should pay back the contributions without interest.

5. The staff members were of course dissatisfied with that and they besought the Centre to make up the cost of redemption of the years of their past service.

The cost was huge -- the Chairman of the Board of the Centre announced it would run to some 4 million United States dollars -- and the Centre did not have the funds to meet the staff members' demands. It therefore proposed at least making a start by redeeming three years' Fund membership at the actuarial cost reckoned as at 1 July 1982, and it made those concerned a gift of $200,000 to help in meeting that cost. Some staff members accepted the proposal, at least provisionally, but took the precaution of lodging internal "complaints". Mrs. Francese, Mrs. Guastavi and others preferred to drop the matter, but without prejudice to their right to lodge or to pursue their claims.

6. Mrs. Francese submitted an internal "complaint" on 20 August 1984, Mrs. Guastavi on 21 August. They objected to the Centre's whole approach and took the view that under the Agreement the Centre had a duty to insure them retroactively throughout their period of service at its own expense. They set out the rules they thought should be applied.

The Centre dismissed the "complaints" on 24 October 1984. Like the claims, the decisions are in identical language and they are the decisions now impugned.

7. The complainants submit first that the provisions of the Agreement form part of the terms of appointment of the staff.

The Centre disagrees. It contends that the Tribunal may hear only complaints alleging non-observance of the terms of appointment of officials or the provisions of the Staff Regulations. That does not cover the Agreement. It did not alter the position of the Italian staff and has no effect with regard to them. It constitutes no more than authorisation from the Italian Government to the Centre to alter a position arising under earlier agreements. In any event only the parties to an international agreement may interpret it, not the Tribunal.

The complainants are not challenging the validity of the Agreement or the state sovereignty of Italy: they are merely pleading the clauses of an international agreement which applies directly to them, and whatever the Tribunal may rule will affect only relations between the Centre and its staff. It is therefore immaterial that the texts they rely on are embodied in an international agreement and alter the Staff Regulations directly or indirectly. Whatever the instrument they may form part of they still relate to the legal position of the international organisation. Where a provision of the Staff Regulations is amended the Tribunal may order the organisation to apply the old text rather than the new one. Likewise, where provisions of the Staff Regulations are replaced by clauses of an international agreement, the Tribunal may order the organisation to apply the former instead of the latter. The Tribunal is therefore competent. Besides, to take a more practical point of view, it would be odd if staff members could not plead an instrument when its immediate purpose was to alter their position.

8. Having rejected the objections to its competence, the Tribunal will entertain the complainants' first plea. What they are arguing is that Articles 1 and 2 of the Agreement set no limit in time on the measures they provide for and prescribe the repayment of the INPS contributions. That, they say, enshrines the idea underlying the Agreement that there should be a clean sweep and that, as regards pensions, the full period of service at the Centre should count for the Fund. In the complainants' submission the proportions to be paid by the INPS and the Centre are no concern of theirs.

To allow the complainants' plea would entail the reversal of a practice that has lasted over fifteen years, a period that has seen great economic changes. Contrary to what they say, it would in fact be tantamount to giving retroactive effect to the Agreement. That is no doubt possible in law since it is a matter of contract and there would be no detriment to third parties. But if the Tribunal is to put on the Agreement a construction that would have such far-reaching consequences it must identify an explicit statement of intent.

Article 1 does not support the plea. According to customary methods of interpretation any action prescribed in a text is deemed to be of immediate effect. There is no presumption of retroactive effect.

Article 2 does say that the INPS shall refund the contributions. But the Agreement merely lays down the general rule and leaves the parties to sort out the arrangements later. As things turned out, the Italian authorities refused to take account of economic changes since 1966 or even to pay interest, and the Tribunal may not rule on such a

decision by a sovereign State.

On the other hand, Article 2 lays no obligation on the Centre to redeem.

The Tribunal concludes that Article 2 cannot reasonably be construed as requiring the Centre to ensure that Italian staff be treated as full members of the Fund as from the date on which they took up duty.

9. The complainants have a second plea: breach of the principle of equality between Centre staff members. They observe that at least since 1970, when the Centre gave a fair number of permanent appointments, the factual situation of the Italian staff has been no different from the others'.

What, then, was the position before the Agreement was concluded?

Mrs. Francese's original contract of employment, dated 30 July 1970 and later renewed, and Mrs. Guastavi's of 16 September 1975, also renewed several times, were explicit: they were to be members of the INPS and barred from membership of the Fund. They signed their original contracts without comment, and they never stated any objections to the terms of their appointment on the renewal of their contracts. Not until 1984 was the matter raised, with the lodging of their internal "complaints" of 20 and 21 August. But by that time the time limits for challenging the terms of their original appointment had long expired. They may not therefore now challenge the decisions on the grounds of breach of the principle of equality.

Nor may they plead that the provisions of the Agreement and the later decisions were in breach of the principle: at the time they were not in the same position as other staff who had all along been with the Fund.

10. Their third plea is breach of good faith. They submit that at least three times, in 1977, in 1980 and again in 1983, in the form of a statement by the Chairman of the Board, they were given on the highest authority both oral and written assurances that the staff, faced though they were with a fait accompli and unable to protect their interests, had no cause for anxiety.

The evidence does suggest that some senior officials offered cheering forecasts that were not borne out by events. But that is not enough to support the charge of bad faith. Besides, even if the charge were proven the only consequence in the circumstances would be a grant of compensation, there being no direct connection between the Centre's behaviour and the complainants' main demands.

The Tribunal concludes that the Centre was not in breach of any of its obligations. The matter called for delicate negotiation, and the Centre tried to take account of the rightful interests of its staff as well as of its own.

In any event the matter is one that cannot be settled by a court of law.

11. In conclusion the Tribunal will answer briefly the complainants' applications for oral proceedings, which they submit the technical complexity of the case requires.

The Tribunal sees no need for oral proceedings. Any technical questions that might have arisen would fall outside the Tribunal's competence since they would be found to concern the Fund.

Lastly, the Tribunal disallows the application for disclosure of further evidence.

12. In the circumstances the complainants are not entitled to costs.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

1. Registry translation.

Updated by PFR. Approved by CC. Last update: 7 July 2000.